

AMENDED IN ASSEMBLY JUNE 21, 2007

AMENDED IN SENATE APRIL 9, 2007

**SENATE BILL**

**No. 645**

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**Introduced by Senator Correa**

(Principal coauthor: ~~Assembly Member Tran~~ coauthors: *Assembly Members Keene and Tran*)

February 22, 2007

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An act to ~~add and repeal Section 20785 of~~ *amend Section 20133 of,* and to ~~add and repeal Section 20785 of,~~ the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 645, as amended, Correa. ~~Orange County Sanitation District: design-build contracts.~~ *Design-build contracts: counties.*

Existing law requires public entities to comply with certain procedures in soliciting and evaluating bids and awarding contracts for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. ~~Existing law authorizes specified state agencies, cities, and counties to implement alternative procedures for the awarding of contracts on a design-build basis.~~

*Existing law, until January 1, 2011, authorizes certain counties, with the approval of the board of supervisors, to enter into design-build contracts, as defined, in accordance with specified procedures.*

*This bill would authorize the County of Nevada to use the design-build process.*

*Existing law authorizes specified state agencies, cities, and counties to implement alternative procedures for the awarding of contracts on a design-build basis.*

This bill would authorize, until January 1, 2013, the Orange County Sanitation District *and the Nevada County Sanitation District No. 1* to enter into design-build contracts in excess of ~~\$10,000,000~~ \$6,000,000, as defined, according to a specified procedure. ~~This bill makes findings regarding the necessity of a special statute.~~

*This bill makes findings regarding the necessity of a special statute.*

*This bill would require specified information to be verified under oath, thus imposing a state-mandated local program by expanding the scope of an existing crime.*

*The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.*

*This bill would provide that no reimbursement is required by this act for a specified reason.*

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.  
State-mandated local program: ~~no~~-yes.

*The people of the State of California do enact as follows:*

1     SECTION 1. Section 20133 of the Public Contract Code is  
2     amended to read:

3     20133. (a) (1) This section provides for an alternative  
4     procedure on bidding on building construction projects in excess  
5     of two million five hundred thousand dollars (\$2,500,000)  
6     applicable only in the Counties of Alameda, Butte, Contra Costa,  
7     Del Norte, El Dorado, Fresno, Humboldt, Kings, Los Angeles,  
8     Madera, Mariposa, Mendocino, Merced, Monterey, Napa, Nevada,  
9     Orange, Placer, Sacramento, San Diego, San Joaquin, San Luis  
10    Obispo, Santa Clara, Shasta, Siskiyou, Solano, Sonoma, Stanislaus,  
11    Tulare, Yolo, and Yuba, upon approval of the appropriate board  
12    of supervisors.

13    (2) These counties may award the project using either the lowest  
14    responsible bidder or by best value.

15    (b) (1) It is the intent of the Legislature to enable these counties  
16    to utilize cost-effective options for building and modernizing public  
17    facilities. It is not the intent of the Legislature to authorize this  
18    procedure for transportation facilities, including, but not limited  
19    to, roads and bridges.

1 (2) The Legislature also finds and declares that utilizing a  
2 design-build contract requires a clear understanding of the roles  
3 and responsibilities of each participant in the design-build process.  
4 The Legislature also finds that the cost-effective benefits to the  
5 counties are achieved by shifting the liability and risk for cost  
6 containment and project completion to the design-build entity.

7 (3) It is the intent of the Legislature to provide an alternative  
8 and optional procedure for bidding and building construction  
9 projects for these counties.

10 (4) The design-build approach may be used, but is not limited  
11 to, when it is anticipated that it will: reduce project cost, expedite  
12 project completion, or provide design features not achievable  
13 through the design-bid-build method.

14 (5) If the board of supervisors elects to proceed under this  
15 section, the board of supervisors shall establish and enforce for  
16 design-build projects a labor compliance program containing the  
17 requirements outlined in Section 1771.5 of the Labor Code, or it  
18 shall contract with a third party to operate a labor compliance  
19 program containing the requirements outlined in Section 1771.5  
20 of the Labor Code. This requirement shall not apply to any project  
21 where the county or the design-build entity has entered into any  
22 collective bargaining agreement or agreements that bind all of the  
23 contractors performing work on the projects.

24 (c) As used in this section:

25 (1) “Best value” means a value determined by objective criteria  
26 related to price, features, functions, and life-cycle costs.

27 (2) “Design-build” means a procurement process in which both  
28 the design and construction of a project are procured from a single  
29 entity.

30 (3) “Design-build entity” means a partnership, corporation, or  
31 other legal entity that is able to provide appropriately licensed  
32 contracting, architectural, and engineering services as needed  
33 pursuant to a design-build contract.

34 (4) “Project” means the construction of a building and  
35 improvements directly related to the construction of a building,  
36 but does not include the construction of other infrastructure,  
37 including, but not limited to, streets and highways, public rail  
38 transit, or water resources facilities and infrastructure.

39 (d) Design-build projects shall progress in a four-step process,  
40 as follows:

(1) (A) The county shall prepare a set of documents setting forth the scope of the project. The documents may include, but are not limited to, the size, type, and desired design character of the buildings and site, performance specifications covering the quality of materials, equipment, and workmanship, preliminary plans or building layouts, or any other information deemed necessary to describe adequately the county's needs. The performance specifications and any plans shall be prepared by a design professional who is duly licensed and registered in California.

(B) Any architect or engineer retained by the county to assist in the development of the project specific documents shall not be eligible to participate in the preparation of a bid with any design-build entity for that project.

(2) (A) Based on the documents prepared in paragraph (1), the county shall prepare a request for proposals that invites interested parties to submit competitive sealed proposals in the manner prescribed by the county. The request for proposals shall include, but is not limited to, the following elements:

(i) Identification of the basic scope and needs of the project or contract, the expected cost range, and other information deemed necessary by the county to inform interested parties of the contracting opportunity, to include the methodology that will be used by the county to evaluate proposals and specifically if the contract will be awarded to the lowest responsible bidder.

(ii) Significant factors that the county reasonably expects to consider in evaluating proposals, including cost or price and all nonprice related factors.

(iii) The relative importance of weight assigned to each of the factors identified in the request for proposals.

(B) With respect to clause (iii) of subparagraph (A), if a nonweighted system is used, the agency shall specifically disclose whether all evaluation factors other than cost or price when combined are:

(i) Significantly more important than cost or price.

(ii) Approximately equal in importance to cost or price.

(iii) Significantly less important than cost or price.

(C) If the county chooses to reserve the right to hold discussions or negotiations with responsive bidders, it shall so specify in the request for proposal and shall publish separately or incorporate into the request for proposal applicable rules and procedures to be

1 observed by the county to ensure that any discussions or  
2 negotiations are conducted in good faith.

3 (3) (A) The county shall establish a procedure to prequalify  
4 design-build entities using a standard questionnaire developed by  
5 the county. In preparing the questionnaire, the county shall consult  
6 with the construction industry, including representatives of the  
7 building trades and surety industry. This questionnaire shall require  
8 information including, but not limited to, all of the following:

9 (i) If the design-build entity is a partnership, limited partnership,  
10 or other association, a listing of all of the partners, general partners,  
11 or association members known at the time of bid submission who  
12 will participate in the design-build contract, including, but not  
13 limited to, mechanical subcontractors.

14 (ii) Evidence that the members of the design-build entity have  
15 completed, or demonstrated the experience, competency, capability,  
16 and capacity to complete, projects of similar size, scope, or  
17 complexity, and that proposed key personnel have sufficient  
18 experience and training to competently manage and complete the  
19 design and construction of the project, as well as a financial  
20 statement that assures the county that the design-build entity has  
21 the capacity to complete the project.

22 (iii) The licenses, registration, and credentials required to design  
23 and construct the project, including information on the revocation  
24 or suspension of any license, credential, or registration.

25 (iv) Evidence that establishes that the design-build entity has  
26 the capacity to obtain all required payment and performance  
27 bonding, liability insurance, and errors and omissions insurance.

28 (v) Any prior serious or willful violation of the California  
29 Occupational Safety and Health Act of 1973, contained in Part 1  
30 (commencing with Section 6300) of Division 5 of the Labor Code,  
31 or the federal Occupational Safety and Health Act of 1970 (P.L.  
32 91-596), settled against any member of the design-build entity,  
33 and information concerning workers' compensation experience  
34 history and worker safety program.

35 (vi) Information concerning any debarment, disqualification,  
36 or removal from a federal, state, or local government public works  
37 project. Any instance in which an entity, its owners, officers, or  
38 managing employees submitted a bid on a public works project  
39 and were found to be nonresponsive, or were found by an awarding  
40 body not to be a responsible bidder.

(vii) Any instance in which the entity, or its owners, officers, or managing employees, defaulted on a construction contract.

(viii) Any violations of the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), excluding alleged violations of federal or state law including the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or of Federal Insurance Contributions Act (FICA; 26 U.S.C. Sec. 3101 et seq.) withholding requirements settled against any member of the design-build entity.

(ix) Information concerning the bankruptcy or receivership of any member of the design-build entity, including information concerning any work completed by a surety.

(x) Information concerning all settled adverse claims, disputes, or lawsuits between the owner of a public works project and any member of the design-build entity during the five years preceding submission of a bid pursuant to this section, in which the claim, settlement, or judgment exceeds fifty thousand dollars (\$50,000). Information shall also be provided concerning any work completed by a surety during this period.

(xi) In the case of a partnership or other association, that is not a legal entity, a copy of the agreement creating the partnership or association and specifying that all partners or association members agree to be fully liable for the performance under the design-build contract.

(B) The information required pursuant to this subdivision shall be verified under oath by the entity and its members in the manner in which civil pleadings in civil actions are verified. Information that is not a public record pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) shall not be open to public inspection.

(4) The county shall establish a procedure for final selection of the design-build entity. Selection shall be based on either of the following criteria:

(A) A competitive bidding process resulting in lump-sum bids by the prequalified design-build entities. Awards shall be made to the lowest responsible bidder.

1 (B) A county may use a design-build competition based upon  
2 best value and other criteria set forth in paragraph (2). The  
3 design-build competition shall include the following elements:

4 (i) Competitive proposals shall be evaluated by using only the  
5 criteria and selection procedures specifically identified in the  
6 request for proposal. However, the following minimum factors  
7 shall each represent at least 10 percent of the total weight of  
8 consideration given to all criteria factors: price, technical design,  
9 and construction expertise, life cycle costs over 15 years or more,  
10 skilled labor force availability, and acceptable safety record.

11 (ii) Once the evaluation is complete, the top three responsive  
12 bidders shall be ranked sequentially from the most advantageous  
13 to the least.

14 (iii) The award of the contract shall be made to the responsible  
15 bidder whose proposal is determined, in writing, to be the most  
16 advantageous.

17 (iv) Notwithstanding any provision of this code, upon issuance  
18 of a contract award, the county shall publicly announce its award,  
19 identifying the contractor to whom the award is made, along with  
20 a written decision supporting its contract award and stating the  
21 basis of the award. The notice of award shall also include the  
22 county's second and third ranked design-build entities.

23 (v) For the purposes of this paragraph, "skilled labor force  
24 availability" shall be determined by the existence of an agreement  
25 with a registered apprenticeship program, approved by the  
26 California Apprenticeship Council, which has graduated  
27 apprentices in each of the preceding five years. This graduation  
28 requirement shall not apply to programs providing apprenticeship  
29 training for any craft that has been deemed by the Department of  
30 Labor and the Department of Industrial Relations to be an  
31 apprenticeable craft in the five years prior to enactment of this act.

32 (vi) For the purposes of this paragraph, a bidder's "safety  
33 record" shall be deemed "acceptable" if their experience  
34 modification rate for the most recent three-year period is an average  
35 of 1.00 or less, and their average ~~Total Recordable Injury/Illness~~  
36 *total recordable injury/illness* rate and average lost work rate for  
37 the most recent three-year period does not exceed the applicable  
38 statistical standards for its business category or if the bidder is a  
39 party to an alternative dispute resolution system as provided for  
40 in Section 3201.5 of the Labor Code.

(e) (1) Any design-build entity that is selected to design and build a project pursuant to this section shall possess or obtain sufficient bonding to cover the contract amount for nondesign services, and errors and omission insurance coverage sufficient to cover all design and architectural services provided in the contract. This section does not prohibit a general or engineering contractor from being designated the lead entity on a design-build entity for the purposes of purchasing necessary bonding to cover the activities of the design-build entity.

(2) Any payment or performance bond written for the purposes of this section shall be written using a bond form developed by the county.

(f) All subcontractors that were not listed by the design-build entity in accordance with clause (i) of subparagraph (A) of paragraph (3) of subdivision (d) shall be awarded by the design-build entity in accordance with the design-build process set forth by the county in the design-build package. All subcontractors bidding on contracts pursuant to this section shall be afforded the protections contained in Chapter 4 (commencing with Section 4100) of Part 1. The design-build entity shall do both of the following:

(1) Provide public notice of the availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the county.

(2) Provide a fixed date and time on which the subcontracted work will be awarded in accordance with the procedure established pursuant to this section.

(g) The minimum performance criteria and design standards established pursuant to paragraph (1) of subdivision (d) shall be adhered to by the design-build entity. Any deviations from those standards may only be allowed by written consent of the county.

(h) The county may retain the services of a design professional or construction project manager, or both, throughout the course of the project in order to ensure compliance with this section.

(i) Contracts awarded pursuant to this section shall be valid until the project is completed.

(j) Nothing in this section is intended to affect, expand, alter, or limit any rights or remedies otherwise available at law.

(k) (1) If the county elects to award a project pursuant to this section, retention proceeds withheld by the county from the

1 design-build entity shall not exceed 5 percent if a performance and  
2 payment bond, issued by an admitted surety insurer, is required in  
3 the solicitation of bids.

4 (2) In a contract between the design-build entity and the  
5 subcontractor, and in a contract between a subcontractor and any  
6 subcontractor thereunder, the percentage of the retention proceeds  
7 withheld may not exceed the percentage specified in the contract  
8 between the county and the design-build entity. If the design-build  
9 entity provides written notice to any subcontractor who is not a  
10 member of the design-build entity, prior to or at the time the bid  
11 is requested, that a bond may be required and the subcontractor  
12 subsequently is unable or refuses to furnish a bond to the  
13 design-build entity, then the design-build entity may withhold  
14 retention proceeds in excess of the percentage specified in the  
15 contract between the county and the design-build entity from any  
16 payment made by the design-build entity to the subcontractor.

17 (I) Each county that elects to proceed under this section and  
18 uses the design-build method on a public works project shall submit  
19 to the Legislative Analyst's Office before December 1, 2009, a  
20 report containing a description of each public works project  
21 procured through the design-build process and completed after  
22 November 1, 2004, and before November 1, 2009. The report shall  
23 include, but shall not be limited to, all of the following information:

- 24 (1) The type of project.
- 25 (2) The gross square footage of the project.
- 26 (3) The design-build entity that was awarded the project.
- 27 (4) The estimated and actual length of time to complete the  
28 project.
- 29 (5) The estimated and actual project costs.
- 30 (6) A description of any written protests concerning any aspect  
31 of the solicitation, bid, proposal, or award of the design-build  
32 project, including the resolution of the protests.
- 33 (7) An assessment of the prequalification process and criteria.
- 34 (8) An assessment of the effect of retaining 5-percent retention  
35 on the project.
- 36 (9) A description of the Labor Force Compliance Program and  
37 an assessment of the project impact, where required.
- 38 (10) A description of the method used to award the contract. If  
39 best value was the method, the report shall describe the factors

1 used to evaluate the bid, including the weighting of each factor  
2 and an assessment of the effectiveness of the methodology.

3 (11) An assessment of the project impact of “skilled labor force  
4 availability.”

5 (12) An assessment of the design-build dollar limits on county  
6 projects. This assessment shall include projects where the county  
7 wanted to use design-build and was precluded by the dollar  
8 limitation. This assessment shall also include projects where the  
9 best value method was not used due to dollar limitations.

10 (13) An assessment of the most appropriate uses for the  
11 design-build approach.

12 (m) Any county named in subdivision (a) that elects to not use  
13 the authority granted by this section may submit a report to the  
14 Legislative Analyst’s Office explaining why the county elected to  
15 not use the design-build method.

16 (n) On or before January 1, 2010, the Legislative Analyst shall  
17 report to the Legislature on the use of the design-build method by  
18 counties pursuant to this section, including the information listed  
19 in subdivision (l). The report may include recommendations for  
20 modifying or extending this section.

21 (o) This section shall remain in effect only until January 1, 2011,  
22 and as of that date is repealed, unless a later enacted statute, that  
23 is enacted before January 1, 2011, deletes or extends that date.

24 **SECTION 1.**

25 *SEC. 2.* Section 20785 is added to the Public Contract Code,  
26 to read:

27 20785. (a) Notwithstanding any other provision of law, the  
28 Orange County Sanitation District *and the Nevada County*  
29 *Sanitation District No. 1* may use the procedures described in  
30 Section 20133 for the construction of projects in excess of ~~ten~~  
31 ~~million dollars (\$10,000,000)~~ *six million dollars (\$6,000,000)*,  
32 including, but not limited to, public wastewater facilities.

33 (b) In addition to the requirements of subparagraph (A) of  
34 paragraph (3) of subdivision (d) of Section 20133, the Orange  
35 County Sanitation District *and the Nevada County Sanitation*  
36 *District No. 1* shall also establish a procedure to prequalify  
37 design-build entities and all subcontractors, including, but not  
38 limited to, mechanical and electrical subcontractors using a  
39 standard questionnaire. The questionnaire shall include a list of  
40 all partners, general partners, or association members known at

1 the time of bid submission who will participate in the design-build  
2 contract, including, but not limited to, mechanical and electrical  
3 subcontractors.

4 (c) For purposes of this section, all references in Section 20133  
5 to “county” and “board of supervisors” shall mean the Orange  
6 County Sanitation District and ~~its~~ *the Nevada County Sanitation*  
7 *District No. 1, and their* board of directors, respectively.

8 (d) This section shall remain in effect only until January 1, 2013,  
9 and as of that date is repealed, unless a later enacted statute, that  
10 is enacted before January 1, 2013, deletes or extends that date.

11 ~~SEC. 2.~~

12 *SEC. 3.* Due to the unique circumstances of the Orange County  
13 Sanitation District *and the Nevada County Sanitation District No.*  
14 *1* with respect to ~~its~~ *their* mandate with the federal Environmental  
15 Protection Agency and the State Water Resources Control Board  
16 for the completion of an additional secondary treatment facility  
17 within the district by December 2012, the Legislature hereby finds  
18 and declares that a general statute cannot be made applicable within  
19 the meaning of Section 16 of Article IV of the California  
20 Constitution. Therefore, the special legislation contained in Section  
21 1 of this act is necessarily applicable only to ~~the Orange County~~  
22 ~~Sanitation District.~~ *Nevada County, and the special legislation*  
23 *contained in Section 2 of this act is necessarily applicable only to*  
24 *the Orange County Sanitation District and the Nevada County*  
25 *Sanitation District No. 1.*

26 ~~SEC. 3.~~

27 *SEC. 4.* No reimbursement is required by this act pursuant to  
28 Section 6 of Article XIII B of the California Constitution because  
29 the only costs that may be incurred by a local agency or school  
30 district will be incurred because this act creates a new crime or  
31 infraction, eliminates a crime or infraction, or changes the penalty  
32 for a crime or infraction, within the meaning of Section 17556 of  
33 the Government Code, or changes the definition of a crime within  
34 the meaning of Section 6 of Article XIII B of the California  
35 Constitution.